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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 1567 of 2003

IN THE MATTER OF CAVALIER HOMES PTY LTD
ACN 054 391 418

AUGUSTO JOHN BEMPORTATO — Applicant

and

PETER WILLIAM WHIFFIN — Respondent

[2003] QSC 154

BRISBANE

..DATE 15/05/2003

ORDER

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HIS HONOUR: This is an application for an order that all proceedings in relation to the winding up of Cavalier Homes Pty Ltd be terminated and an order that the costs of the liquidators and the costs of and incidental to the application be costs in the winding-up proceedings. The company was put into liquidation on 20th of February this year, on the just and equitable ground.

It had previously traded profitably for a number of years as a building company. It was a company which was essentially a partnership company operated between Mr Bemportato and Mr Whiffin, the applicant and the respondent today. They had a falling out. As a result, a liquidator was appointed.

In the period since February this year, they have reached an agreement about their future relationships and their financial relationships, though I dare say, they have not entirely reconciled their differences. It has been agreed that one of them will take over the operation of the company, and the other will completely sell out.

The company when it was put into liquidation was solvent, and I am satisfied, is solvent now. I am satisfied that there is a substantial excess of assets over liabilities, and that it is able to pay its debts as and when they fall due. The liquidators have in material filed before me today attempted to cast some doubt on that position, in a somewhat wishy washy approach. They neither support nor oppose the application before me today, but suggest that before any order is made

ORDER

there ought to be a report prepared for creditors and a creditors meeting called.

No doubt that would cost a lot of money and generate a lot of fees. The reason for taking such a step is unclear. The liquidator in his material today has suggested that he is unable absolutely to say that the company is solvent. However, it is clear from the balance sheet at the end of the last financial year, together with an affidavit which the liquidator made in February this year, when his interest was somewhat different from what it is today, that he had no substantial doubts or indeed no doubts at all as to its solvency at that time.

In my view, there is as I have said no doubt about its solvency on the evidence before me, and no one has been able to point to any reason why there should be a different view taken. The liquidator points to a lot of contingent debts, but these will always arise in connection with a company which is a building company and has ongoing transactions. I should have mentioned that the liquidator was carrying on the business of the company, and a large number of contracts have been in progress.

A question does arise as to the approach which should be taken by me in this application. I was referred to the well known list of considerations enunciated by Master Lee QC as he then was in Re: Warbler Pty Ltd, 1982, and I have been furnished with the report in 6 ACLR 526. As I understand it that was

not a winding up on the ground of just and equitable, and counsel have not in their researches found any case performing a similar task for the just and equitable ground. I am sure if any of them had found any case they would have referred it to me.

It seems to me that where one has a company which has been in liquidation for a relatively short period, where the liquidation was brought about by a dispute between effectively two partners, and where the company was at all material times solvent, and remains so, the considerations set out by Master Lee QC are not all applicable. I see no reason why if the company is able to resume its operations without being deadlocked, and is solvent and able to pay all its creditors it should not be returned to the hands of its directors and shareholders.

There was some attempt not only on behalf of the liquidator but also on behalf of the applicant to induce me to consider what the applicant and the respondent, Mr Whiffin, intend to do after the company is removed from liquidation. I see no reason why I should look at that. It is not the function of the Court on this occasion, given a company in the peculiar situation of this one, to consider how the company should carry on business in future. I do not think I should either approve or disapprove what is proposed to be done. I was told from the Bar table, and there is no reason to doubt it, that there is a deed which provides for substantial amounts of

money to be removed from the company after it is removed from liquidation.

That is a matter for the directors. If they are acting unlawfully they will have to bear the consequences of what they do. I do not propose to examine the course that they propose to undertake with a view to being urged by those acting on their behalf to give them an imprimatur in advance. It will be quite adequate for their conduct to be examined if and when it takes place.

In saying this, I should add that I have no reason to think that there is anything which is not proper proposed to be done. The management of the company is a matter for the directors when it is a solvent company. There might be in other cases be considerations regarding the interest of shareholders, but as it happens the two directors own or control all the shareholding interests, and no questions affecting other contributories fall for consideration.

The only other interest which is of some concern to me is that of the liquidator in relation to his fees and charges. Since the company is solvent, there is some argument for saying that there is no reason why he should be in any different position from other creditors after the winding up is terminated. However, there is the point as counsel for the liquidator, Mr Schulte, rightly pointed out, that as things presently stand the liquidator has a priority right to payment.

ORDER

Notwithstanding that he has besieged me with enormous amounts of paper and has proposed the carrying out of substantial amounts of further work before the winding-up order is made, I do not think his conduct is such as to deprive him of that advantage.

Some arrangement should be made which preserves it in a commercial way after the winding-up order is terminated. Counsel for the applicant has suggested that that might be achieved by the insertion of a condition into the order along the lines of, "Subject to the provision of security for the reasonable amount of the liquidator's fees and charges to the satisfaction of the Registrar, the company be wound up". As presently advised, it seems to me that such a condition would achieve the object with which I am concerned.

I wish to make it clear that I have made my decision solely on the basis of the fact that I am satisfied that the company is no longer deadlocked and will be able to continue to trade in the future, that it is comfortably solvent and that adequate provision is made to ensure the liquidator's rights. There is no reason to think that the rights of the creditors are, in any way, prejudiced nor those of contributories and no other reason has been shown why the order should not be made.

I would ask that counsel prepare a draft and bring in a signed draft reflecting the reasons which I have just given.

ORDER